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In the Supreme Court of the United States

OCTOBER TERM, 1987

OPAL V. MITCHELL AND WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES, PETITIONERS

v.

UNITED STATES OF AMERICA AND BONNEVILLE POWER ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the decision of the Bonneville Power Administration ("BPA"), a federal agency, to follow Federal Aviation Administration (FAA) guidelines on the marking of its power lines does not fall within the "discretionary function" exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a).

1. In May 1980, Vernon Mitchell, petitioners' decedent, was killed while crop dusting a field located in a valley near the Yakima River in Washington when his airplane struck an unmarked wire strung across the valley as part of BPA's power transmission system (Pet. App. A1, B2-B4). The BPA had not marked the wire, which was 400 feet above the ground (Pet. 4), because it decided to rely on FAA guidelines regarding the marking of power lines. Those guidelines required marking of power lines only at heights of 500 feet or greater (Pet. App. A3).

Washington state law requires markings for wires or lines as low as 150 feet where, as presumably was the case here, they cross certain routes frequented by small aircraft (Pet. 5).

The district court rejected the government's contention that petitioners' suit under the FTCA was barred by the discretionary-function exception, 28 U.S.C. 2680(a), reasoning that the agency decision was made at the operation level rather than at the planning level (see Pet. App. A3). The court imposed liability after concluding that the BPA was negligent in failing to mark the ground wires and in "blindly relying upon the advice of the Federal Aviation Administration as to whether or not the lines should be marked without making any independent investigation or inquiry itself or seeking comments specifically from pilots or pilot organizations * * *" (*id.* at B5). The court also found that Mr. Mitchell was 25% contributorily negligent (*id.* at B8).

The court of appeals reversed, holding that the BPA's decision to rely on the FAA policy was insulated from tort liability by the discretionary-function exception to the FTCA. "The BPA did not negligently install or maintain warning devices, but rather, affirmatively decided to adopt the FAA's policy of not marking ground wires below 500 feet" (Pet. App. A3). The court rejected petitioners' argument that the BPA was without discretionary authority to breach the mandatory duty of care imposed by Washington law, because "[n]egligence * * * is irrelevant to the discretionary function issue. The FTCA itself exempts discretionary functions 'whether or not the discretion involved be abused.' 28 U.S.C. 2680(a)." *Id.* at A3-A4.

2. The court of appeals was plainly correct. As petitioners note (Pet. 4), "[t]he BPA has established a policy of following the guidelines of the [FAA]." The decision to rely on the federal agency with expertise in airplane safety

and a statutory mandate to regulate air safety, 49 U.S.C. 1421, is, as the court of appeals concluded (Pet. App. A3), obviously a discretionary decision founded on policy judgment. It is therefore protected by the discretionary-function exception to the FTCA. See *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). Of course, the protected decision to adhere to the FAA guidelines makes irrelevant the breach of any other applicable duty to warn.

The decision of the court of appeals presents no conflict warranting this Court's review. First, contrary to petitioners' contention (Pet. 7-8), *Aslakson* v. *United States*, 790 F.2d 688 (8th Cir. 1986), does not conflict with the decision below, because the federal agency in that case was held liable for negligently implementing its policy of raising its power lines in certain circumstances (*id.* at 693). Here, the alleged negligence was not in BPA's implementing a policy, but in making the policy decision to follow FAA guidelines. Second, any apparent conflict among the circuits on whether the distinction between operational and planning decisions is relevant to applying the discretionary-function exception (Pet. 9-11) is simply immaterial in this case. The BPA's decision to follow FAA guidelines obviously was one of planning, which would fall within the exception in every circuit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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